73-1233

No.

Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD AND PETER G. NASH, GENERAL COUNSEL, PETITIONERS

*v.*

SEARS, ROEBUCK AND CO.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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The Solicitor General, on behalf of the National Labor Relations Board and its General Counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the subject case.

## OPINIONS BELOW

The order of the court of appeals (Pet. App. A, pp. 1a–2a) is not yet officially reported. The memorandum and order of the district court are reported at 346 F. Supp. 751 (Pet. App. C, pp. 4a–10a).

## JURISDICTION

The judgment of the court of appeals was entered on July 27, 1973 (Pet. App. A, p. 1a). The Board's

timely petition for rehearing *en banc* was denied on September 13, 1973 (Pet. App. B, p. 3a). On December 6, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to February 11, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Freedom of Information Act requires the disclosure of internal agency memoranda authorizing or refusing to authorize the prosecution of cases before the adjudicatory branch of the agency, and discussing the evidence and the legal theories upon which the prosecution should be based.

## STATUTE INVOLVED

The relevant provisions of the Freedom of Information Act, as amended, 5 U.S.C. 552, are set out in Appendix D, pp. 11a–14a.

## STATEMENT

### A. THE PROCEDURE FOR PROCESSING UNFAIR LABOR PRACTICE CHARGES

Section 3(d) of the National Labor Relations Act, as amended (29 U.S.C. 153(d)), gives the General Counsel of the National Labor Relations Board "final authority on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10." The General Counsel has delegated the initial power to decide whether a complaint should issue on an unfair labor practice charge to the Board's 31 Regional Directors. N.L.R.B. Organization and Functions, Sec.



203.1, 32 F.R. 9588, 9589; N.L.R.B. Statements of Procedure, Sec. 101.4, 29 C.F.R. 101.4.

Upon the filing of a charge, an investigation is conducted by a member of the regional office staff. If the evidence satisfies the Regional Director that the charge is meritorious, he issues a complaint setting forth the acts alleged to constitute unfair labor practices. N.L.R.B. Statement of Procedures, Sec. 101.8, 29 C.F.R. 101.8; N.L.R.B. Rules and Regulations, Sec. 102.15, 29 C.F.R. 102.15. If the Regional Director concludes that the charge is without merit, he declines to issue a complaint, and so informs the parties by letter; it contains a brief statement of the reasons for the action, and advises the charging party of his right to appeal to the General Counsel. N.L.R.B. Statements of Procedure, Sec. 101.6, 29 C.F.R. 101.6; N.L.R.B. Rules and Regulations, Sec. 102.19, 29 C.F.R. 102.19.

In certain cases the Regional Director, before disposing of a charge, refers some or all of the issues presented to the General Counsel's Division of Advice in Washington, D.C. N.L.R.B. Statements of Procedure, Sec. 101.8, 29 C.F.R. 101.8. The Regional Director submits a case for advice if he believes that it presents novel or complex problems, or if it involves issues which the General Counsel has specified should be submitted in the interest of insuring the development of a uniform policy. The Regional Director transmits his request for advice by a memorandum, which details the facts discovered and the issues on which advice is sought.

Upon receipt of a request for advice, the Division of Advice considers the issues presented and sends a memorandum to the Regional Director (the "advice memorandum"). The memorandum may advise the Regional Director to dismiss the charge, to issue a complaint thereon, to proceed at his discretion, to seek a settlement, or to conduct a further investigation. The memorandum sets forth the reasons for the recommended action and, if it recommends issuance of a complaint, it may discuss possible factual and legal defenses, trial tactics, and the basis for settlement. Prior advice memoranda are not used as precedents, although they are occasionally referred to in an advice memorandum or attached thereto, in order to amplify the reasoning of the Division of Advice in the case under submission. See A. 194–196, 201, 211–227;[1] Quarterly Report on Case-Handling Developments, BNA, *Labor Relations Yearbook* (1968) 283–284.

Following receipt of the advice memorandum, the Regional Director disposes of the charge. While the Regional Director rarely, if ever, disregards advice on legal issues, he makes the ultimate decision whether to issue a complaint and in what form. The advice memorandum is not referred to either in the complaint or in any other communication which the Director may send to the parties.

Regardless of whether a case has been submitted to the Division of Advice, the Regional Director's decision not to issue an unfair labor practice complaint may be appealed to the General Counsel. N.L.R.B. Rules and Regulations, Sec. 102.19, 29 C.F.R. 102.19. The General Counsel's Office of Appeals reviews the entire file of the case in the light of the parties' written and oral presentations. N.L.R.B. Statements and Procedure, Sec. 101.6, 29 C.F.R. 101.6. See also Quarterly Report on Case-Handling Developments, BNA, *Labor Relations Yearbook* (1968) 294–295; A. 198–200. Based upon such consideration, the Office of Appeals may affirm the Regional Director's refusal to issue a complaint, in which case a letter will be sent to the parties stating the grounds of the affirmance. N.L.R.B. Rules and Regulations, Sec. 102.19(c), 29 C.F.R. 102.19(c); A. 228–232. If, however, the Office of Appeals concludes that further proceedings are warranted, it so notifies the parties by letter, and sends the Regional Director a memorandum (the "appeals memorandum").[2] This memorandum, like the comparable advice memorandum, sets forth the reasons why a complaint should issue, and often discusses matters related to its prosecution—*e.g.*, credibility of evidence, desirability of seeking further evidence, and legal arguments for reconciling the theory of the complaint with existing Board precedent. (A. 233–239.) Upon receipt of this memorandum, the Regional Director, unless there is a settlement, issues a complaint.

[1] "A." refers to the appendix in the court below. A copy is being filed with the Clerk.

[2] Prior to April 1971, such a memorandum was also prepared in cases where the Regional Director's refusal to issue a complaint was sustained.

### B. THE PRESENT CASE

On April 6, 1971, Sears, Roebuck and Co. ("Sears") filed a charge with the Board's Regional office in Seattle, Washington, alleging that the Retail Clerks Union, Local No. 4, was violating Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. 158(b)(3), by refusing to bargain with Sears individually and insisting, instead, that Sears bargain in a multi-employer unit. After investigation, the Regional Director submitted the case to Washington for advice. Thereafter, by letters dated June 10 and July 26, the Regional Director notified Sears that he was refusing to issue a complaint on the charge because Sears' "attempted withdrawal from the [multi-employer association] was untimely, in that the investigation disclosed negotiations were already in progress at the time of the attempted withdrawal"; the Director cited several Board cases as authority for his decision (A. 24–25, 33–34). Sears appealed the Regional Director's decision to the General Counsel and, on August 20, the Acting General Counsel [3] reversed the Regional Director and ordered the issuance of a complaint. The Acting General Counsel ruled that the issue raised—whether a preliminary exchange of written proposals constituted a commencement of multi-employer negotiations—warranted Board determination (A. 42). An unfair labor practice complaint issued on September 1, 1971 (A. 44–48). That complaint is still pending.

[3] The Acting General Counsel at that time was Eugene G. Goslee. On August 24, 1971, Peter G. Nash assumed the duties of General Counsel (A. 49, 51).



Prior to appealing from the Regional Director's refusal to issue a complaint, Sears, relying on the Freedom of Information Act, requested the General Counsel to make available to it: (1) the memorandum prepared by the Division of Advice advising the Regional Director with respect to Sears' unfair labor practice case; (2) all advice and appeals memoranda for the past five years which involve issues similar to those in the instant case; and (3) any index or digest of advice and appeals memoranda (A. 26–29). That request, as amended to include documents explaining the advice and appeals memoranda (A. 35–38), was denied by the Acting General Counsel on the grounds, *inter alia*, that the materials were exempt from disclosure under Exemptions 5 and 7 of the Freedom of Information Act (A. 141–142, 147–149).

Sears then filed a complaint in the United States District Court for the District of Columbia under the Freedom of Information Act, seeking disclosure of the material (A. 5–14, 15–23). The General Counsel filed an answer requesting that the complaint be dismissed (A. 49–53) [4] and the parties filed cross-motions for summary judgment (A. 186–187).

The district court granted Sears' motion for summary judgment (Pet. App. C, pp. 4a–10a). It found

[4] On February 3, 1972, General Counsel Nash announced that, although the Freedom of Information Act did not require advice and appeals memoranda to be disclosed, he would voluntarily make such memoranda available in closed cases—*i.e.*, where appeal rights had been exhausted or a Board decision and order had issued—since such disclosure then would not interfere with the prosecution of cases (A. 54–55).

that advice memoranda are "instructions mandatory in substance if not in form," and thus constitute "instructions to staff that affect a member of the public" under the Freedom of Information Act, 5 U.S.C. 552(a)(2)(C) (Pet. App. C, p. 7a); that appeals memoranda are "final opinions" under that Act, 5 U.S.C. 552(a)(2)(A) (Pet. App. C, p. 9a); that neither were "intra-agency" memoranda within the meaning of Exemption 5, 5 U.S.C. 552(b)(5) (Pet. App. C, p. 8a–9a); and that documents incorporated by reference in advice and appeals memoranda, "though possibly qualified for a Sec. (b) exemption taken separately, * * * lost their exempt status by incorporation" (Pet. App. C, p. 8a).

The district court ordered the General Counsel: (1) promptly to make available to the public "all Appeals and Advice memoranda issued since July 4, 1967, and any document expressly incorporated therein by reference; (2) to "produce and compile," with reasonable promptness, "indices of said memoranda"; (3) to "produce explanatory material including existing documents in those instances where Advice or Appeals memoranda rely upon the 'circumstances of the case' or some other vague and imprecise reference * * * except where [the General Counsel] can demonstrate that these documents are exempt under the Act"; and (4) to "cease and desist from deleting from said Appeals and Advice materials the names of parties, the names of attorneys, citations to prior cases and all other information for which a justification for deletion has not been explained fully in writing except settlement suggestions from the Office of the General Counsel and the names of affiants" (Pet. App. C, pp. 9a–10a).



The court of appeals affirmed on the basis of the district court opinion. It also cited its recent opinion in another Freedom of Information Act case, *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board*. (Pet. App. A, p. 2a.)

## REASONS FOR GRANTING THE WRIT

This case, and the court of appeals' prior decision in *Grumman, supra,* in which we intend to file a petition for a writ of certiorari shortly, present important issues involving the extent to which the Freedom of Information Act requires the disclosure of internal governmental memoranda which form the basis for governmental action and decision and which discuss and analyze the legal and factual theories upon which administrative litigation and proceedings are based. The decisions in this case and *Grumman,* by significantly and unwarrantedly limiting the scope of important exemptions to the Act, would seriously restrict the freedom of discussion and communication within the government which is essential to its effective functioning and which the exemptions were designed to protect.

1. The Freedom of Information Act, 5 U.S.C. 552, provides that government agencies shall make available to the public a broad spectrum of information, but exempts from its mandate certain specified categories of information. Exemption 5 excepts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law

to a party other than an agency in litigation with the agency" (5 U.S.C. 552(b)(5)). This exemption is designed to protect the efficiency of the government by permitting the "frank discussion of legal or policy matters" rather than forcing government agencies to "operate in a fishbowl" (S. Rep. No. 813, 89th Cong., 1st Sess. 9; see, also, H. Rep. No. 1497, 89th Cong., 2d Sess. 10).

In *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, this Court recognized that Exemption 5 was designed to incorporate the pre-existing privilege against the disclosure of intra-governmental documents when such disclosure would be injurious to the consultative functions of government. *Id.* at 87. It accordingly distinguished between "materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other." *Id.* at 89. The former are protected against disclosure under the fifth exemption, while purely factual material contained in intra-agency memoranda, if severable without compromising the remainder of the contents, are subject to disclosure.

The advice and appeals memoranda here involved discuss the legal and policy considerations favoring, or militating against, the prosecution of a particular case; the sufficiency of the evidence uncovered in the investigation; and, if prosecution be recommended, the scope and legal theory of the complaint, trial tactics, and acceptable settlement terms. They reflect the views of the General Counsel on whether the case warrants prosecution, and guide the Regional Director in taking further action, *e.g.*, issuing a complaint and prosecuting it before the Board. For these reasons, and since the Regional Director's ultimate decision and the reasons therefor are fully communicated to the parties either through the complaint which he issues or the letter which he sends explaining his refusal to proceed, advice and appeals memoranda are not subject to discovery in litigation against the agency. *Davis* v. *Braswell Motor Freight Lines, Inc.*, 363 F. 2d 600, 603–605 (C.A. 5). They are accordingly protected against disclosure under Exemption 5 as interpreted in *Mink, supra.*



Contrary to the interpretation of Exemption 5 announced in *Mink*, the courts below concluded that Exemption 5 applied only to memoranda which reflect "a preliminary view or a record of advocacy and debate" (Pet. App. C, p. 8a). Thus, rather than protecting the entire "open, frank discussion between subordinate and chief concerning administrative action" (Reed, J. in *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 946 (Ct. Cls.), quoted with approval in *Mink, supra*, 410 U.S. at 87), the exemption as interpreted by the courts below protests only that portion of the discussion in which the subordinate presents his views. Although the fifth exemption is to be limited "as narrowly as consistent with efficient Government operation," S. Rep. No. 813, *supra*, at 9, the restrictive reading of the courts below goes further, and limits the exemption in a manner which severely hampers such operations by impeding the free flow of directions and advice from agency superiors to their subordinates in implementing agency objectives.

2. The Freedom of Information Act contains two

other exemptions from compulsory disclosure which also apply to the advice and appeals memoranda.

(a) Exemption 7 covers "investigatory files compiled for law enforcement purposes except to the extent available by law to a [private] party" (5 U.S.C. 552(b)(7)). The exemption "covers investigatory files related to enforcement of * * * labor and securities laws as well as criminal laws" (H. Rep. No. 1497, *supra*, at 11).[5] It rests on the premise that the "disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court" (S. Rep. No. 813, *supra*, at 9).

Advice and appeals memoranda are prepared as part of the General Counsel's investigation into whether an unfair labor practice case should be prosecuted before the Board (and, if necessary, the courts), and constitute part of the investigatory file. These memoranda often contain discussions of trial strategy, possible defenses, and evaluations of the testimony of prospective witnesses, so that their disclosure while the case is pending could well impede its effective prosecution. Moreover, since the decision below requires the production of "explanatory material including existing documents in those instances where Advice or Appeals memoranda rely upon the 'circumstances of the case' or some other vague and imprecise reference" (Pet. App. C, p. 10a), it would

[5] See *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591 (D.P.R.); *Clement Bros.* v. *National Labor Relations Board*, 282 F. Supp. 540 (N.D. Ga.), affirmed, 407 F. 2d 1027 (C.A. 5); *Frankel* v. *Securities and Exchange Commission*, 460 F. 2d 813, 817 (C.A. 2).



cause the agency's investigatory files to be opened still further, thereby enhancing the risk of hampering prosecution of the case. For these reasons, appeals and advice memoranda and other documents in the agency's investigatory files are not ordinarily available by law to a private party;[6] they are thus within the seventh exemption from compulsory disclosure under the Freedom of Information Act.

(b) Although the Government did not rely upon Exemption 2, that exemption also covers these memoranda. It applies to matters that are "related solely to the internal personnel rules and practices of an agency" (5 U.S.C. 552(b)(2)). The House Report indicates that under this exemption "operating rules, guidelines and manuals of procedure for Government investigators or examiners would be exempt from disclosure" (H. Rep. No. 1497, *supra*, at 10). The Senate Report, however, indicates that it "relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like" (S. Rep. No. 813, *supra*, at 8).

The examples cited in the Senate Report were illus-

[6] See *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F. 2d 854, 857–859 (C.A. 2); *Rutter-Rex Co., Inc.* v. *National Labor Relations Board*, 473 F. 2d 223, 231–234 (C.A. 5), certiorari denied, No. 72–1501, October 9, 1973. However, under the Board's "Jencks rule," 29 C.F.R. 102.118(b), a witness' pre-trial statements are made available after the witness has been called to testify. The legislative history of Exemption 7 indicates that Congress did not intend to make these statements available any earlier. 110 Cong. Rec. (daily ed.) 1779–1780 (July 31, 1964).

memoranda were documents required by 5 U.S.C. 552(a)(2) to be made publicly available and indexed.

For the reasons we have outlined, we submit that the advice and appeals memoranda are exempt from the requirements of the Freedom of Information Act. There is therefore no need for this Court to consider whether, if those exemptions do not apply, the documents are required to be published and indexed by 5 U.S.C. 552(a)(2). We nevertheless contend that the courts below were wrong in so categorizing them.

Section (a)(2) of the Act applies, *inter alia,* to all "final opinions; including concurring and dissenting opinions, as well as orders made in the adjudication of cases" (5 U.S.C. 552(a)(2)(A)), and to "administrative staff manuals and instructions to staff that affect a member of the public" (5 U.S.C. 552(a)(2)(C)). The courts below concluded that advice memoranda were "instructions to staff that affect a member of the public," and hence that Section (a)(2)(C) required their disclosure (Pet. App. C, p. 7a). However, by its terms that provision requires disclosure only of "*administrative* staff manuals and instructions" (emphasis added). The prefix "administrative," which modifies both manuals and instructions, indicates that Congress intended to cover only manuals and instructions which deal with procedural or other administrative matters, and not discussions of specific cases which are being considered for possible prosecution.

The legislative history confirms this conclusion. The Senate Report, in explaining the word "administrative," stated (S. Rep. No. 813, *supra,* at 2):



trative and not exclusive, and the two reports are not necessarily inconsistent. Indeed, since the House considered the bill which became the Freedom of Information Act after it passed the Senate, and did not change the language of Exemption 2, the House evidently believed its interpretation of Exemption 2 was consistent with that of the Senate expressed in the Senate Report.[7]

We submit that the memoranda here consist of guidelines for agency personnel which, consistent with the House Report, should be considered to be exempt from disclosure under the second exemption.[7] They are similar to the documents referred to in that report, and are no less entitled to protection. See *Polymers, Inc.* v. *National Labor Relations Board,* 414 F. 2d 999, 1006 (C.A. 2), certiorari denied, 396 U.S. 1010, cf. *Cuneo* v. *Schlesinger,* 484 F. 2d 1086 (C.A.D.C.).

3. The Freedom of Information Act divides agency documents into three categories: some must be published in the Federal Register (5 U.S.C. 552(a)(1)); others must be published or made publicly available, and indexed (5 U.S.C. 552(a)(2)); all other documents must be made available on request (5 U.S.C. 552(a)(3)). As we have indicated, the Act then defines nine categories of documents which are totally exempt from its requirements (5 U.S.C. 552(b)). The lower courts held that the advice and appeals

[7] *Stokes* v. *Brennan,* 476 F. 2d 699 (C.A. 5) and *Hawkes* v. *Internal Revenue Service,* 467 F. 2d 787 (C.A. 6), are, we believe, incorrect in concluding that the Senate and House Reports are inconsistent, and that the Senate report reflects a congressional intent that only documents relating to an agency's relations with its employees may be considered to be within the exception.

> The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters rather than to law enforcement matters protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action.

Similarly, the House Report stated (H. Rep. No. 1497, *supra*, at 7–8):

> [A]n agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff * * * in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution, or settlement of cases.[8]

The courts below also erred in concluding that appeals memoranda are "final opinions" within the meaning of Section (a)(2)(A) (Pet. App. C, p. 9a). Appeals memoranda are issued only in cases where an appeal is sustained and prosecution of the case is to be undertaken (*supra*, p. 5). Accordingly, far from constituting the agency's final action in the case, these memoranda always trigger further proceedings in the case.

In any event, they are not opinions "made in the adjudication of cases." The General Counsel adjudicates no cases; he simply decides whether to initiate them.

[8] Cf. *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 795 (C.A. 6) (the term "administrative" was inserted in Section 552(a)(2)(C) "to bar disclosure of information which, if known to the public, would significantly impede the enforcement process").



The courts' conclusion that the advice and appeals memoranda must be indexed was based upon its incorrect determination that they were instructions to staff and final opinions within Section (a)(2) of the Act. If, as we contend, they are exempt from disclosure under Section (b) of the Act or not covered by Section (a)(2), it follows that they need not be indexed.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

PETER G. NASH,
*General Counsel,*
JOHN S. IRVING,
*Deputy General Counsel,*
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NORTON J. COME,
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FEBRUARY 1974.

# APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 72-1870

[No Opinion]

September Term, 1972

Civil Action No. 1571-71

SEARS, ROEBUCK & CO., ON ITS OWN BEHALF AND ON BEHALF OF OTHER CHARGING PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT

*v.*

NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, ACTING GENERAL COUNSEL, ON HIS OWN BEHALF AND AS AGENT FOR THE NATIONAL LABOR RELATIONS BOARD, APPELLANTS

(Filed July 27, 1973)

Appeal from the United States District Court for the District of Columbia.

Before WILBUR K. MILLER, Senior Circuit Judge, and WRIGHT and ROBB, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an

opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from herein is hereby affirmed on the basis of the opinion of District Judge Howard F. Corcoran, *see Sears, Roebuck & Co.* v. *NLRB*, D. D.C., 346 F.Supp. 751 (1972). *See also Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, —— U.S. App. D.C. ——, —— F.2d —— (No. 71-1730, decided July 3, 1973).

It is FURTHER ORDERED by this court that the stay ordered by the District Court is hereby dissolved.

Per Curiam.

For the Court:

HUGH E. KLINE,

*Clerk.*

## APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

No. 72-1870

September Term, 1973

Civil Action 1571-71

SEARS, ROEBUCK AND CO., ON ITS OWN BEHALF AND ON BEHALF OF OTHER CHARGING PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT

*v.*

NATIONAL LABOR RELATIONS BOARD, AND EUGENE G. GOSLEE, ACTING GENERAL COUNSEL ON HIS OWN BEHALF AND AS AGENT FOR THE NATIONAL LABOR RELATIONS BOARD, APPELLANTS

(Filed September 13, 1973)

Before: WILBUR K. MILLER, Senior Circuit Judge; WRIGHT and ROBB, Circuit Judges

ORDER

On consideration of appellants' petition for rehearing, it is

ORDERED by the Court that appellants' aforesaid petition is denied.

*Per Curiam.*

For the Court:

HUGH E. KLINE,

*Clerk.*

## APPENDIX C

United States District Court for the District of Columbia

Civil Action No. 1571–71

SEARS, ROEBUCK AND CO., ON ITS OWN BEHALF AND ON BEHALF OF OTHER CHARGING PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT, PLAINTIFF

*v.*

NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, ACTING GENERAL COUNSEL, IN HIS OWN BEHALF AND AS AGENT FOR THE NATIONAL LABOR RELATIONS BOARD, DEFENDANTS

(Filed August 10, 1972)

MEMORANDUM AND ORDER

This cause is before the Court on cross motions for summary judgment.

Plaintiff[1] Sears, Roebuck and Co. (hereinafter Sears) is a "charging party" before the National Labor Relations Board, (Board Case No. 19–CB–1673), and seeks access, pursuant to the Freedom of Information Act (hereinafter the Act), 5 U.S.C. § 552, to certain documents issued by the Office of the

[1] Plaintiff argues that it is a proper class representative that may therefore seek relief on behalf of a class of charging parties before the National Labor Relations Board. Since whatever relief this Court chooses to grant the plaintiff will necessarily be binding on the defendants as to all persons, the Court need not and does not address this issue.





General Counsel of the Board, commonly referred to as Advice and Appeals memoranda, and certain other materials incorporated by reference therein.

The Act grants this Court jurisdiction "to enjoin the defendants from withholding agency records" prospectively in addition to "order[ing] the production of any Agency records improperly withheld" from a complainant. 5 U.S.C. § 552(a)(3).

Defendants have historically maintained a uniform policy of withholding the sought-after documents, and, although a portion of the memoranda have been made available by defendants to the public during the pendency of this case,[2] the defendants maintain that this revelation reflects a voluntary change of policy and is not required by the Act. Defendants also refuse to make available documents incorporated by reference in said memoranda, and have deleted from the documents made available such matter as the names of parties, the names of attorneys and citations to prior Advice and Appeals memoranda.

The controversy giving birth to this action[3] arose between the plaintiff and the Retail Clerk's International Union (hereinafter "Union") in April, 1971. The plaintiff charged the Union with violating Section 8(b)(3) of the National Labor Relations Act (hereinafter, N.L.R.A.). As required by N.L.R.A. plaintiff

[2] On February 3, 1972, the General Counsel announced that, while he still considered the Advice and Appeals memoranda protected by the Freedom of Information Act, he would make available all Advice and Appeals memoranda when the case involved was completed.

[3] In related proceedings this Court issued a preliminary injunction on March 17, 1972 staying proceedings in Board Case No. 19–CB–1673 until records which the Board made available to the plaintiff (only after substantial delay) could be examined by the plaintiff for use in that case before the Board.

Sears filed its charge with the Regional Director of the Nineteenth Region of the National Labor Relations Board in Butte, Montana, (hereinafter, Regional Director). The objective of the plaintiff in bringing its charge to the Regional Director was to obtain the issuance of a complaint against the Union.

Under the provisions of the N.L.R.A. the final authority to issue such a complaint is vested in the office of the Board's General Counsel 29 U.S.C. § 153(d).[4] The General Counsel has in turn delegated the initial power to determine whether a complaint should be issued to the Regional Directors. National Labor Relations Board, Organization and Functions, Section 203.1, 32 F.R. 9588. Board Statements of Procedure, Sec. 101.4, 29 C.F.R. Sec. 101.4.

To promote uniformity in the administration of the Act, the General Counsel required that Regional Directors when faced with requests that raise "novel" problems, submit a description of the request to the General Counsel's Office in Washington for "Advice" as to disposition. Statements of Procedure Sec. 101.8. The ostensible purpose behind this procedure is to insure that new questions arising in the field of labor relations be handled in substantially the same manner in all parts of the country. In this way Advice memoranda are issued in all the novel and significant cases brought by charging parties. After extensive centralized consideration the Advice Branch of the Office of the General Counsel issues these memoranda containing its final conclusions to the regional directors, who regularly implement these memoranda by issuing or refusing to issue complaints as "advised" by the Advice Branch.

[4] The General Counsel concedes that in the performance of his pre-complaint prosecutorial authority, he is clearly an agency within the meaning of 5 U.S.C. § 551(1).



Defendants claim that these memoranda include a diversity of information including settlement suggestions. However, careful examination of the procedure reveals that the net effect of an Advice memorandum is to truncate the delegated authority of a Regional Director to the point where his issuance of a complaint or refusal to do so is merely a ministerial function. Far from being recommendations, although ancillary recommendations may be contained therein, Advice memoranda are instructions mandatory in substance if not in form. As such, they constitute "instructions to Staff that affect a member of the public." 5 U.S.C. § 552(a)(2)(c).

When a regional director fails to issue a complaint, either pursuant to the recommendation of the Advice Branch, or independently in a case not referred to the Advice Branch, the charging party may move the Office of the General Counsel to reconsider the decision by seeking relief from the Office of Appeals. Statements of Procedure, Sec. 101.6. The conclusions of the Office of Appeals have traditionally been summarized in memoranda called the "General Counsel's Minute." Plaintiff does not seek access to these documents.

Thereafter the General Counsel either sustains the refusal to proceed or orders the Regional Director to issue the complaint. Additionally the Office of Appeals prepares a second memorandum—the "agenda minute"—which provides an analysis of the decision and which is sent to the Regional Director. It is access to this second group of appeals memoranda that plaintiff seeks.

Letters containing only the result, though not necessarily the underlying rationale, were sent to the parties previously in this action. During the pendency of this action a new policy has been instituted by the Gen-

eral Counsel whereby a portion of the information found previously only in the agenda minutes is included in these letters.

The Action of the General Counsel's office on appeals of the refusal of Regional Directors to issue complaints, whether made pursuant to "advice" from the Counsel office or otherwise is clearly final. This is not a preliminary view or a record of advocacy and debate, it is a final determination of the General Counsel's staff of the disposition of a charge. It is not an expression of a point of view, it is the disposition of a charge. As such the Appeals memorandum lies outside the Act's §(b)(5) exemption. Congress intended by that exemption only to promote the "free flow of information" *Ackerly* v. *Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969), and did not "design [it] to facilitate the easy exchange of substantive declarations of policy. Indeed if it were, the exemption would have clearly engulfed the rule." *Sterling Drug* v. *F.T.C.*, 450 F.2d 698, 713 (D.C. Cir. 1971) Bazelon J. dissenting in part. *See also*, Davis, "The Information Act: A Preliminary Analysis," 34 Chicago Law Rev. 761. Since the memoranda lie outside the exemption, they *must* be disclosed. *Tennessean Newspapers* v. *F.H.A.* —— F.2d —— (6th Cir., May 4, 1972); *Getman* v. *N.L.R.B.*, 450 F.2d 670, 672 (D.C. Cir. 1971).

It follows, further, that documents incorporated by reference in Advice and Appeals memoranda, even though possibly qualified for a Sec. (b) exemption taken separately, must also be disclosed, since they have lost their exempt status by incorporation. *American Mail Line Ltd.* v. *Gulick*, 411 F.2d 696, 703 (D.C. Cir. 1968).

Upon consideration of the undisputed facts and after examining examples of the requested memoranda, this Court concludes: (a) that the Advice and



Appeals memoranda are not "intra-agency memorandums" within the meaning of §.552(b)(5) of the Act; (b) that the Advice memoranda are "instructions" which affect a member of the public within the meaning of the Act; (c) that the Appeals memoranda issued in cases still pending, including those issued in Board Case No. 19–CB–1673, are "final opinions" within the meaning of the Act; (d) that documents expressly incorporated by reference are in fact part of said memoranda; (e) that in cases where the aforesaid memoranda rely upon and make reference to the "circumstances of the case" without delineating these "circumstances" the General Counsel must produce explanatory material including documents unless the General Counsel demonstrates such documents to be exempt; (f) that the Advice and Appeals memoranda made available shall include the names of the parties, the names of the attorneys, citations to prior cases and all other information for which justification for deletion has not been explained fully in writing except the names of affiants, and settlement suggestions from the Office of the General Counsel to the regional directors; and (g) that, the Act requires that the Advice and Appeals memoranda issued since July 4, 1967 be indexed and such indices be made available to the public.

Accordingly, the Court concludes that the plaintiff's motion for summary judgment should be granted and the defendant's motion for summary judgment be denied. It is *so ordered* and further *ordered* that—

(1) that defendants promptly make available to the public all Appeals and Advice memoranda issued since July 4, 1967, and any document expressly incorporated therein by reference;

(2) that defendants with reasonable promptness produce and compile, if necessary, indices of said memoranda;

(3) that defendants produce explanatory material including existing documents in those instances where Advice or Appeals memoranda rely upon the "circumstances of the case" or some other vague and imprecise reference without delineating what those circumstances are except where they can demonstrate that these documents are exempt under the Act;

(4) that defendants cease and desist from deleting from said Appeals and Advice materials the names of parties, the names of attorneys, citations to prior cases and all other information for which a justification for deletion has not been explained fully in writing except settlement suggestions from the Office of the General Counsel and the names of affiants.

H. F. CORCORAN,
*Judge.*

Dated: August 10, 1972.

## APPENDIX D

The provisions of the Freedom of Information Act, as amended (5 U.S.C. 552) are as follows:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedures, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may

not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—



(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance, with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from with holding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

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